

1 APPEARANCES:

2 On behalf of Environmental Protection Agency:

3 ROBERT STACHOWIAK, ESQUIRE

4 Office of General Counsel

5 Environmental Protection Agency

6 1200 Pennsylvania Avenue, NW.

7 Washington, D.C. 20460

8 (202) 564-0580

9

10 On behalf of EPA Region 1:

11

12 RONALD A. FEIN, ESQUIRE

13 Environmental Protection Agency, Region 1

14 1 Congress Street, Suite 1100

15 Boston, Massachusetts 02114

16 (617) 918-1040

17

18 On behalf of Petitioner Conservation Law

19 Foundation and Charles River Watershed:

20 PETER SHELLEY, ESQUIRE

21 Conservation Law Foundation

22 62 Summer Street

Boston, Massachusetts 02110

(617) 350-0990

On behalf of Respondent Mirant Kendall, LLC and

Mirant Kendall Station:

RALPH A. CHILD, ESQUIRE

Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.

One Financial Center

Boston, Massachusetts 02111

(617) 542-6000

KRISTY A.N. BULLEIT, ESQUIRE

Hunton & Williams, LLP

1900 K Street, NW.

Washington, D.C. 20006-1109

(202) 955-1500

22

1 APPEARANCES (CONT'D):

2 On behalf of Massachusetts Department of
3 Environmental Protection:

4 ROBERT G. BROWN, ESQUIRE
5 Massachusetts Department of Environmental
6 Protection
7 One Winter Street, Third Floor
8 Boston, Massachusetts 02108
9 (617) 292-5926

10 ALSO PRESENT:

11 EURIKA DURR
12 CHERYL A. MACKAY, ESQUIRE
13 DAVID WEBSTER
14 SHAWN KONARY

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1 PROCEEDINGS

2 THE CLERK: All rise. The Appeals
3 Board of the United States Environmental
4 Protection Agency is now in session for a
5 status conference in re: Mirant Kendall, LLC,
6 Permit No. MA0004898, NPDES Appeal Nos. 06-12
7 and 06-13. The Honorable Judge Edward Reich
8 presiding. Please be seated.

9 JUDGE REICH: Good morning,
10 counsel, and thank you for coming this
11 morning. We are here today pursuant to the
12 Board's Order of August 21 of this year
13 scheduling this status conference. I will
14 ask counsel to identify themselves for the
15 record in just a minute.

16 My understanding is that we have
17 participating this morning counsel for the
18 two petitioners, one being Mirant Kendall the
19 permittee in this matter and the other the
20 Conservation Law Foundation and Charles River
21 Watershed Association filing jointly and to
22 whom for convenience I will refer to

1 collectively as "CLF"; also, U.S. EPA Region
2 I, the permit issuer; and by video, a
3 representative of the Massachusetts
4 Department of Environmental Protection
5 participating in accordance with the Board's
6 September 17, 2007, order granting leave to
7 participate.

8 First, let me introduce off to my
9 left Cheryl McKay, counsel to the Board who
10 is assisting me in this matter.

11 Now I would like to ask counsel to
12 identify themselves for the record, beginning
13 with Mirant Kendall, then CLF, Region 1, and
14 MADEP.

15 MR. CHILD: Good morning, Your
16 Honor. My name is Ralph Child, and I am with
17 the law firm of Mintz Levin in Boston. I
18 have two people with me who, if it's fine
19 with you, can introduce themselves.

20 JUDGE REICH: Okay.

21 MS. BULLEIT: Good morning, Your
22 Honor. I am Kristy Bulleit, I am with the

1 law firm of Hunton & Williams in Washington,
2 D.C.

3 MR. KONARY: Good morning, Your
4 Honor. I am Shawn Konary, director of
5 Environmental Policy and Regulatory Affairs
6 from Mirant.

7 JUDGE REICH: Okay. Thank you.
8 CLF?

9 MR. SHELLEY: Your Honor, Peter
10 Shelley for Conservation Law Foundation and
11 Charles River Watershed.

12 JUDGE REICH: Okay. Thank you.
13 Region I?

14 MR. FEIN: Your Honor, Ronald Fein
15 for the United States Environmental
16 Protection Agency, Region 1. With me at the
17 counsel table is James Curtin, the Office of
18 General Counsel. Sitting behind me are
19 Robert Stachowiak also from the Office of
20 General Counsel and David Webster, manager of
21 the Industrial Permits Branch in Region 1.

22 JUDGE REICH: Okay. And then

1 participating in Boston we have Mass Dep.

2 MR. BROWN: Robert Brown of the
3 Office of General Counsel, MADEP.

4 JUDGE REICH: Okay. Thank you, Mr.
5 Brown. Since this is a status conference and
6 not an oral argument, I think we can proceed
7 somewhat less formally. But as you can see,
8 a transcript is being made of these
9 proceedings and the record will be part of
10 the Board's docket for these appeals.

11 While this was established as a
12 status conference, I would note that the
13 Board has before it three interrelated
14 motions related to potential stay of all or
15 part of these proceedings.

16 So I want to make sure that before
17 we adjourn this morning that I fully
18 understand the positions of the parties
19 because I would like to be able to have the
20 Board address those motions as soon as we can
21 and help establish the framework for
22 proceeding.

1 If I may, let me briefly summarize
2 my understanding of the position of each of
3 the parties in term to confirm that it is
4 correct. If you have any corrections that
5 you think need to be made to my
6 understanding, please go ahead and do that.

7 Starting with the Region, as I
8 understand it the Region by way of its July
9 25, 2007, motion has requested a stay of all
10 proceedings before the Board until April 18,
11 2008, with the Region intending to withdraw
12 in accordance with 40 C.F.R. 124.19(d)
13 provisions of the permit, "informed by the
14 suspended portions of the Phase II rule" and
15 prepare a draft permit modification
16 addressing the portions of the permit so
17 withdrawn.

18 In essence, as I understand it, the
19 Region is asking the Board to take no action
20 even on those portions not affected by the
21 impending withdrawal until it completes the
22 proposed permit modification at which time

1 any appeal arising from the modification
2 would likely be consolidated with portions of
3 the current petitions not mooted by the
4 permit revision.

5 The Region also requests a Board
6 order clarifying "With respect to the
7 portions of the permit that were neither
8 withdrawn under Section 124.19(d) nor
9 otherwise newly affected by the permit
10 modification neither the petitioners nor any
11 other party may file additional petitions for
12 review or provide new arguments not present
13 in the original petitions or supplements
14 thereto" filed to this date.

15 Mr. Fein, I have some questions
16 about the region's motion, but first I would
17 just like to ask if I'm correctly stating
18 your position or whether you would like to
19 make any clarifications to it?

20 MR. FEIN: That's a correct
21 summary, Your Honor.

22 JUDGE REICH: Okay. Thank you.

1 Mr. Brown, my understanding from the footnote
2 in the filing you submitted to the Board is
3 basically MADEP supports the action the
4 Region is proposing to take; is that correct?

5 MR. BROWN: That's correct, Your
6 Honor.

7 JUDGE REICH: Okay. Well, I have a
8 couple of questions for you as well. My
9 understanding of Mirant Kendall's position is
10 that, for the reasons detailed in its motions
11 of July 31, Mirant Kendall supports the
12 Region's motion to the extent that it
13 contemplates a withdrawal of the provisions
14 informed for the Phase II rule, but requests
15 that the entire permit be remanded to the
16 Region for the Region to withdraw the permit
17 in its entirety and develop a new complete
18 permit.

19 Mirant Kendall opposes the Region's
20 request for a Board order addressing the
21 permissible scope of public participation in
22 the development of a revised permit or permit

1 terms.

2 Is that a correct statement, Mr.
3 Childs?

4 MR. CHILDS: Generally correct,
5 Your Honor, yes.

6 JUDGE REICH: How would you make it
7 more than generally correct?

8 MR. CHILDS: I think the focus of
9 our request that the Board send the permit
10 back is on the interrelationship between some
11 of the provisions that the Region wants to
12 withdraw and some of the other provisions
13 that ought to be considered concurrently with
14 the ones that it does want to withdraw.

15 JUDGE REICH: Okay. I think we
16 will probably get into that in just a little
17 bit.

18 Finally, my understanding from
19 CLF's motion of August 1 is that while CLF is
20 agreeable to the requested stay for
21 provisions relating to the Phase II rule, I
22 think that assumes the Region moves

1 expeditiously to proceed to develop new
2 permit terms related to CWIS, that it opposes
3 any stay for any aspect of the petitions that
4 relate to permit provisions not being
5 withdrawn and seeks instead to have the Board
6 order the Region to file a response and have
7 the Board then proceed to issue a decision on
8 the merits as to those aspects of the
9 petition.

10 I also understand CLF, similar to
11 Mirant Kendall, to be opposing the Region's
12 request as it relates to Board issuance of an
13 order dealing with scope of public
14 participation in any further proceedings
15 after withdrawal.

16 Is that correct, Mr. Shelley?

17 MR. SHELLEY: Your Honor, with
18 respect to the first part, that's correct.
19 With respect to the public comment, we are
20 actually in line with the EPA's thinking,
21 that the record on those issues is closed and
22 should be closed to new additions or public

1 comment or anything else related to the
2 non-withdrawn portions which are closed. We
3 are just objecting to their order at this
4 point --

5 JUDGE REICH: Right.

6 MR. SHELLEY: -- anticipating a
7 problem that hasn't happened yet. We think
8 both EPA and the Board have adequate powers
9 to deal with that.

10 JUDGE REICH: Okay. I do think
11 that was kind of my understanding, and I
12 appreciate the clarification between the
13 position on the issue in general and the
14 order, what I was loosely focused on at that
15 point.

16 From what we have briefly just
17 discussed and my review of the various
18 motions, unless somebody corrects me at this
19 point, I'm going to assume that nobody
20 questions that the Region has the legal
21 authority to withdraw permit terms under
22 124.19(d) nor opposes the Region's request

1 for a stay at least as to those provisions;
2 is that correct?

3 MR. SHELLEY: Correct, Your Honor.

4 JUDGE REICH: Okay. So that being
5 the case, the immediate focus I think for the
6 Board is clearly on how to address the
7 various motions pending for either a stay or
8 for action relative to the appeal of
9 provisions not being withdrawn.

10 As I alluded to earlier in that
11 regard, I do have a few questions. Although,
12 this again, as I said, is not a full-blown
13 hearing, but I think I would be helpful to
14 understand some of this.

15 Mr. Fein, can you explain for me
16 what the status and the timing is of the
17 prospective withdrawal, assuming it is still
18 perspective, of the CWIS-related provisions?

19 MR. FEIN: Yes, Your Honor. On
20 September 19, we held a meeting at which
21 counsel and clients for both Mirant and CLF
22 and CRWA were present as well as a number of

1 state agency officials, which petitioners
2 presented their views regarding the
3 appropriate 316(b) technologies that should
4 be subject for the modification.

5 We are now analyzing the
6 information that they presented. Our
7 timeframe very approximately is a withdrawal
8 draft permit modification. We would probably
9 issue the withdrawal notice shortly before
10 the draft permit is issued.

11 The reason for that is that we
12 don't know precisely which permit provisions
13 are modified, so we know which technology we
14 are going to propose. That timeframe, moving
15 forward to a public comment period and
16 response to comments, a public hearing, if
17 appropriate, consultation with other
18 agencies, if necessary, should get us to a
19 final permit modification by April.

20 JUDGE REICH: So you think April
21 18, 2008, is still a realistic date?

22 MR. FEIN: Assuming that what we

1 are doing is a draft permit modification
2 limited to --

3 JUDGE REICH: Okay. Just one
4 thing, for clarification, you were pretty I
5 think precise in your motions in talking
6 about withdrawing the provisions that were
7 informed by the Phase II rule. I was
8 wondering if there was significance to that?
9 Are there any CWIS provisions that are not
10 being withdrawn?

11 MR. FEIN: Your Honor, as I said,
12 we haven't yet determined precisely what --

13 JUDGE REICH: But in terms of, I
14 mean, you did give some indication in one of
15 your filings of what you anticipated
16 withdrawing. I just didn't know whether I
17 should read into that reference to being
18 informed by the Phase II rule some
19 possibility that there were some
20 316(b)-related provisions that weren't
21 informed by that rule, and therefore would
22 not be withdrawn or whether you were

1 intending to withdraw anything that was
2 implementing 316(b). Are you saying you
3 haven't yet decided that?

4 MR. FEIN: The first answer is we
5 haven't formally decided, but I would venture
6 that we will likely be withdrawing the
7 provisions that pertain to 316(b), most or
8 all of those provisions.

9 It is possible that part of the
10 provisions will be able to stay and would not
11 require modification. But as I said in the
12 reply brief, we withdraw most or all of those
13 identified provisions.

14 JUDGE REICH: Can I ask, Mr. Brown,
15 relative to Massachusetts, is the permit that
16 you issued -- I mean, was there literally a
17 jointly issued permit or did you issue a
18 parallel permit to what the Region issued or
19 neither?

20 MR. BROWN: It is a jointly issued
21 permit, Your Honor, that is part and parcel
22 of the federal permit. The federal permit

1 specifically identifies the state portions of
2 the permit and the parties' rights under that
3 permit.

4 JUDGE REICH: Are the provisions
5 relating to CWIS part of the state part of
6 the permit, or is that just a question for
7 EPA?

8 MR. BROWN: I believe, Your Honor,
9 that the portions of the permit that
10 addressed cooling water intake structure are
11 part of the federal permit and part of the
12 state permit. Certain terms of that permit,
13 however, are attributable to the state's
14 water quality certification.

15 JUDGE REICH: What is the state's
16 intention relative to the state permit
17 relative to the CWIS provisions if the Region
18 withdraws, from a federal standpoint, its
19 provisions? Are they going to remain in the
20 state permit, or are you going to withdraw
21 those provisions? Or, what happens those
22 provisions in the meanwhile?

1 MR. BROWN: The state permit is
2 currently pending a parallel proceeding
3 before the state appeals office. We envision
4 the need to revisit the cooling water intake
5 structure issues based on how EPA applies its
6 best professional judgment to those issues.

7 We don't know if the permit will
8 become more stringent or less stringent as a
9 result of that review, so it is possible that
10 we may need to reissue the water quality
11 certification and make appropriate changes in
12 the state permit accordingly.

13 JUDGE REICH: Is the state permit
14 stayed by operation of appeals?

15 MR. BROWN: Yes, the state permit
16 is currently stayed by rule of the Agency.
17 Now, in addition to the stay of the permit,
18 there is an appeal pending of the water
19 quality certification that we issued. That
20 has been stayed as well.

21 JUDGE REICH: Okay. Thank you.

22 MR. BROWN: That stay is pending.

1 the outcome of these proceedings.

2 JUDGE REICH: Okay. Mr. Fein, and
3 I realize you are still sorting through this,
4 but at this point do you see any of the
5 provisions relating to thermal discharge
6 standards as being sufficiently affected by
7 the withdrawal of the 316(b) provisions that
8 you would withdraw those as well?

9 MR. FEIN: Your Honor, we don't
10 anticipate that would be in the case. But in
11 the process of developing the draft permit
12 modification, we will take a close look
13 throughout the rest of the permit, and if
14 there are any issues that are not directly
15 pertaining to 316(b), cooling water intake
16 structure requirements, but are somehow
17 indirectly affected such that they would
18 benefit from withdrawal and reissuance,
19 subject to renewed public comment, we will do
20 that.

21 JUDGE REICH: Okay. I assume you
22 have looked at the discussion in the Mirant

1 Kendall filing, it's on page 3, where they
2 talk about the interrelationship of
3 provisions addressing 316(a) and those
4 addressing 316(b) and why they are linked?

5 In fact, I think they quote the
6 response to comments with the Region saying
7 that the limits operate in tandem. I gather
8 none of what is in there at this point you
9 find persuasive in terms of a need to
10 withdraw any of the 316(a) provisions?

11 MR. FEIN: Not at this point, Your
12 Honor. Again, as I said, if in the process
13 of developing the draft permit modification
14 or in the process of public comment, if a
15 party identifies to us a issue that requires
16 withdrawal and modification, we will look
17 into that.

18 But, for example, the thermal
19 avoidance temperatures are what they are.
20 They are not affected by the suspension of
21 the -- much of the basis for the 316(a)
22 limits will stand. It is conceivable, I

1 can't foreclose the possibility that a permit
2 condition that is not directly related to
3 316(b) would require withdrawal and
4 reissuance, but at the moment we are not
5 anticipating that.

6 JUDGE REICH: Okay. I am
7 relatively new to this case so I'm not, I
8 will admit, as familiar as I ultimately may
9 need to be with the rather extensive
10 petitions for review and supplemental
11 petitions for review.

12 Are there any real significant
13 316-related provisions that aren't at the
14 moment effectively stayed by the fact that we
15 have these petitions before us, or were all
16 of the more significant provisions part of
17 one or the other petitions for review?

18 MR. FEIN: Your Honor, the
19 petitions were quite broad and at the moment
20 the entire permit is stayed.

21 JUDGE REICH: Have you notified
22 parties that that is the scope of the stay,

1 that it covers the entire permit?

2 MR. FEIN: We have not yet sent out
3 a letter under 124.16 that would identify the
4 issues.

5 JUDGE REICH: Okay. Thank you.
6 Mr. Child, in terms of what you have
7 requested the Board to do, do you think that
8 the Board actually has the authority to
9 compel the Region to withdraw more of the
10 permit terms than the Region voluntarily
11 chooses to withdraw under 124.19, given that
12 we haven't even addressed the merits of the
13 petitions yet?

14 MR. CHILD: Your Honor, I recognize
15 that the rules do not specifically provide
16 that authority. I think our position would
17 be that as the Board looks at this case and
18 the issues in it, it is within the Board's
19 inherent authority as a review board in
20 control of its docket, trying to bring
21 efficiency to a process that is inherently
22 not efficient, has the authority to determine

1 whether all in all it is better for the
2 Region to reopen the whole permit whereas we
3 have argued, and I'd be happy to provide some
4 further detail on this, it is pretty clear
5 that there are substantial linkages between
6 the issues that they want to withdraw and the
7 really critical issues that they don't want
8 to withdraw at this point.

9 JUDGE REICH: I am wondering, in
10 terms of efficiency for the Board, how we get
11 ourselves smart enough to understand
12 everything that is involved in this permit
13 proceeding and the proceedings, to kind of
14 decide whether that is the case or not
15 without taking up a lot of time to decide
16 that issue that the Region could be sort of
17 proceeding down the road it is proceeding.

18 I mean, I understand that there can
19 be interrelationships. It is not my first
20 316 case, and I've seen that before. But I
21 understand the sort of complexity of it.

22 It would seem to me that what

1 would, in essence, be second-guessing the
2 region up front would require a comfort level
3 and an understanding of the
4 interrelationships of the terms of the permit
5 that I'm not going to get from a superficial
6 reading of it.

7 MR. CHILD: Well, we would be happy
8 to provide as much help in that exercise as
9 Your Honor can stand. But I think that, as
10 you indicate from your past experience, it is
11 pretty clear on the face of things that there
12 are those kinds of interrelationships.

13 Then, when you apply that knowledge
14 to a modicum of information, they are going
15 to be happy to go through the history of this
16 permit proceeding for you for a minute, it's
17 quite clear to us anyway and I think we can
18 satisfy Your Honor that there are many issues
19 that overlap.

20 We are quite concerned that some of
21 the information that the Agency will have to
22 consider on the 316(b) issues that it is

1 taking back about the nature of the river and
2 the nature of the plant and their
3 interrelationships as it affects 316(b) a lot
4 of new information is going to be considered
5 by the Region on the issues it wants to
6 withdraw.

7 But it doesn't want to reopen the
8 same set of issues on the thermal, even
9 though they are related, because they don't
10 want to have to deal with the new
11 information, which we think favors our
12 position.

13 JUDGE REICH: I assume if there are
14 provisions that the Region does not withdraw
15 and you think should be withdrawn, then at
16 the point which you are commenting on the
17 provisions that they have reposed, you are
18 probably going to make that argument I would
19 assume?

20 MR. CHILD: That's a safe
21 assumption.

22 JUDGE REICH: The Region will have

1 to address it, and they will come back to the
2 Board I think in that case in a slightly
3 differently posture, in a slightly different
4 context.

5 MR. CHILD: I think that from their
6 procedural route, that would happen as you
7 describe. I think our objective is to try to
8 shortcut some of that and get back to the
9 real issues with the Region rather than
10 deferring it.

11 JUDGE REICH: Well, I think that is
12 -- I appreciate that. I think that is the
13 one common theme that I see in all the
14 filings, and I'm so pleased to see that, is
15 everybody would like to move this proceeding
16 in an efficient and, hopefully, relatively
17 prompt way. It is just different perceptions
18 on the best way to accomplish that result.

19 Mr. Shelley, in your motion, you
20 asked that the Region indicate which terms it
21 was intending to withdraw. It did to a
22 certain degree in the response it filed with

1 us.

2 It sound like, and we kind of knew
3 that from the way they had filed the document
4 initially, that this is somewhat of an
5 ongoing process. Do you think you have
6 gotten a fair response to your request in
7 terms of having a sense of where the Region
8 is going on that issue?

9 MR. SHELLEY: Yes, Your Honor. We
10 think they did a good job.

11 JUDGE REICH: Do you basically
12 agree that there is not such an
13 interrelationship between 316(a) and 316(b)
14 that action taken on 316(b) should
15 necessarily drive action on 316(a)?

16 One reason I ask that is in your
17 filing, and you are obviously talking about
18 this for a different purpose, but I think you
19 yourselves made the point that there is this
20 interrelationship.

21 Because you indicated, for
22 instance, depending on where the Board came

1 out with the 316(a) variance, that could
2 affect the permissible volume of cooling
3 water, which then could affect the
4 application of 316(b).

5 In a way that was almost suggesting
6 to me the kind of interrelationship that
7 Mirant Kendall was arguing exists to support
8 the idea that the whole permit should be
9 reconsidered.

10 MR. SHELLEY: Your Honor, I think
11 that their one circumstance, in all candor,
12 where we see the kind of issue you are
13 raising, actually creating that
14 cross-connection between 316(a) and (b) would
15 be if Region 1 determined that a closed-loop
16 cooling system, BTA, at that facility in
17 which case it would be very little or limited
18 thermal discharge coming out of the plant.

19 So under those set of circumstances
20 which we have asked for -- which we think is,
21 based on everything we know, highly unlikely
22 as an outcome but we are not trying to

1 foreclose that even for ourselves at this
2 point -- that is the one circumstance where
3 Agency action on 316(b) could dramatically
4 adjust what happens on 316(a).

5 One of our arguments we're for with
6 316(a) at this point, however, is based on
7 sort of a reverse connection, which we think
8 is very critical. That is, if we are
9 accurate that Region 1 316(a) variance is not
10 based on the right legal standard and that a
11 stricter thermal regime needed to be
12 protected in the Charles River, then that
13 determination could change maybe not what
14 Region 1 determines for BTA for 316(b), but
15 how the company thinks about the cost/benefit
16 of different technologies that they are going
17 to use to address both problems.

18 Our biggest concern is that the
19 Board would actually agree with us under
20 316(a), that the Agency's action did not
21 adequately ensure protection of that balanced
22 indigenous population, require the Agency to

1 lower the thermal regime and therefore change
2 the whole calculation for the company.

3 That's why we want to get that done
4 right now, because the record is ready to go
5 on it. I think as the counsel for Region 1
6 said it is about what is out there in the
7 river much more so than what is happening at
8 the plant and its technology.

9 JUDGE REICH: If the Region is
10 correct in stating that it really only has a
11 finite amount of resources to devote
12 essentially to this matter and resources
13 devoted to, in essence, litigating the 316(a)
14 aspects of the petitions will be drawn away
15 from working on the revisions for 316(b) and
16 delay getting that part of it done, would you
17 still prefer to see that happen?

18 MR. SHELLEY: Your Honor, we
19 acknowledge and recognize, as I think we said
20 in our papers, that the resource limitations
21 are accurate. We have even more extreme
22 resource limitations in our little group, so

1 we are very sensitive to that issue.

2 We would rather -- but again, we
3 are looking at overall the most likely way to
4 reduce the overall time of getting this
5 permit reissued they are operating under, a
6 1988 permit, different operating
7 circumstances, what we would propose would be
8 to allow Region 1 to expand the time for
9 coming back and concluding their 316(b)
10 analysis, give them more months on that end,
11 rather than use that reason to justify not
12 moving forward here.

13 The second point, and again I have
14 to say even after 30 years of experience this
15 is my first EAP appearance, so I'm a neophyte
16 here. But the workload that is required to
17 respond to the petitions, hold the record
18 together, or perhaps do any briefing that the
19 Board might allow is quite manageable and
20 falls mostly on the legal department.

21 So the engineering staff, although
22 they are going to be involved in that, are

1 free to continue to work on some of the BTA
2 issues. We think it needs to be done,
3 otherwise this process is actually likely to
4 take longer rather than shorter.

5 The other point I would like to
6 agree to in advance, the other potential
7 delay or staff resource issue that we could
8 possibly foresee would be in the circumstance
9 that the petition was accepted, reviewed, and
10 the Board agreed with either Mirant or CLF
11 and CRWA's position.

12 We would certainly agree ahead of
13 time that any judicial review of a Board
14 order that adversely affected us, we would
15 agree to an order staying our 30-day appeal
16 rights until the full permit was available
17 for judicial review.

18 JUDGE REICH: Okay.

19 MR. SHELLEY: So we think that part
20 of it actually can be managed in a way that
21 will minimize that part of the case, which
22 could be a big time saver.

1 JUDGE REICH: Okay. Thank you.
2 Mr. Fein, going to a different aspect of what
3 you have asked for, which is the order
4 basically admonishing the world at large that
5 they cannot comment on matters in the
6 development of the revised permit terms that
7 are not related to the 316(b) process either,
8 because the implement 316(b) or they are
9 necessarily connected with it, I am still
10 having trouble I will admit as to what the
11 purpose is?

12 I mean, isn't it in fact true as I
13 think both petitioners argue that 124 kind of
14 speaks for itself as to what the scope of
15 public participation is? I am concerned that
16 if, and there is a lot of interpretation of
17 124, we impose on that process a Board order
18 now you're having to parse the Board order as
19 well as 124 to figure out what it is we
20 intended. I'm not sure how that really
21 advances things.

22 I mean, you seemed mostly to be

1 wanting to send a signal to Mirant Kendall I
2 think by raising the issue. I suspect you've
3 sent the signal, and you guys will have the
4 opportunity to kind of argue about it later
5 on in a proper forum. But I'm still having a
6 hard time really understanding the value of a
7 Board order at this point.

8 MR. FEIN: Thank you, Your Honor.
9 First, to clarify, the request was not for an
10 order limiting the scope of what parties can
11 comment on, but rather on the scope of what
12 would be subject to new petitions.

13 Our concern is quite plainly that
14 this process of withdrawing and modifying the
15 316(b) provisions not reopen the entire
16 permit to new arguments raised in
17 supplemental petitions that could have been
18 raised in the original filing period but were
19 not, either for new petitioners who neglected
20 to file petitions but now wish to or from
21 existing petitioners who wish to raise new
22 arguments that again could have been raised

1 earlier.

2 Obviously, with respect to
3 petitions that were withdrawn and modified or
4 issues that were not withdrawn and modified
5 but upon which there is a colorful argument
6 raised by the petitioners that they should
7 have been withdrawn and modified, they are
8 somehow newly affected by the modification,
9 the Region obviously has no opposition to the
10 parties bringing those before the Board.

11 The value of an advance order
12 simply to provide some degree of advanced
13 certainty and clarity so that while I agree
14 with you that Part 124 does speak for itself.
15 I'm not sure that Mirant's view of what it
16 means is the same as ours. In the Mirant's
17 motion for a remand it states on the sixth
18 page that 124.19(d) requires that the newly
19 issued draft permit can be commented on in
20 the same manner as any other draft permit,
21 which necessarily means that all of its
22 provisions are subject to comment.

1 What I foresee, and I am attempting
2 to forestall, is a truckload of boxes of
3 comments concerning provisions that have not
4 changed and have not been affected in any way
5 by the modification.

6 JUDGE REICH: Now I'm a little
7 confused. Because I thought -- you corrected
8 my understanding and indicated that you were
9 really looking for an order that addressed
10 what could be appealed to the Board, and now
11 we seem to be back talking about what is
12 permissible in terms of comments.

13 MR. FEIN: Oh, Your Honor, if we
14 had that order in advance, then we could have
15 a one-sentence response to all of those
16 comments, "See Board Order, Docket Number
17 Such-and-Such."

18 Lacking that order if we're
19 required to take a risk that our
20 interpretation of 124.19 is not the Board's
21 and that we might be conservative and in the
22 alternative feel obligated to respond on the

1 merits to all of those, I'm not saying that's
2 what we would do, but we would certainly have
3 to consider a two-part response.

4 One is procedural and the other in
5 the alternative on the substance so as not to
6 get a remand if we err in that. With the
7 order, it would save us the second step.

8 JUDGE REICH: Okay. Do either of
9 the petitioners having heard that have a
10 different view about whether having an order
11 like that could help expedite the process?

12 MR. SHELLEY: We think the rule
13 speaks for itself.

14 JUDGE REICH: Okay.

15 MR. CHILDS: Your Honor, our
16 position would be the same as CLF's, I think
17 the rule speaks for itself. It will sort out
18 in the later process.

19 JUDGE REICH: Okay. Thank you.
20 Let me ask whether any of the persons here,
21 and that includes Mr. Brown up in the Region,
22 has anything else that they want to bring to

1 the Board's attention that we haven't already
2 covered. Obviously, you can assume we have
3 read what you've filed with us, but is there
4 something else that we need to be discussing
5 that we haven't already discussed?

6 MR. CHILDS: Your Honor, I would
7 like to just elaborate on the issue of the
8 interrelationship between 316(a) and 316(b)
9 in this case.

10 As Mr. Fein mentioned, there was a
11 meeting just last week that was, from our
12 perspective, a very preliminary meeting where
13 the region asked us on short notice to come
14 in and provide information on a very long
15 list of very complicated topics having to do
16 essentially with the intake structure and the
17 benefits of an intake structure at various
18 potential locations.

19 We reviewed very quickly probably
20 about half a dozen different technological
21 answers. None of those had the benefit of
22 any real engineering analysis.

1 The one thing that did become clear
2 through that discussion is that there are a
3 lot of interrelationships between whatever
4 the region decides on the intake and the
5 316(a) issues, and let me just identify two
6 or three key ones.

7 One, as Mr. Shelley mentioned, it
8 is clear to us that the Region is considering
9 again whether or not cooling towers are the
10 answer or a part of the answer. Indeed, I
11 have with me the agenda that the Region
12 distributed at the meeting last week. The
13 very first item is: "EPA is particularly
14 interested in site-specific feasibility of
15 the following technologies," and lists
16 cooling towers.

17 We spent a goodly portion of the
18 meeting last Wednesday talking about that,
19 and we're preparing a submission for next
20 week at the Region's request that will
21 address cooling towers and feasibility issues
22 around them.

1 Another technology that was
2 discussed at that meeting was called
3 "variable-speed drives," which allow a plant
4 like this to reduce the amount of flow
5 through with effects both on the amount of
6 intake and the 316(b) issues, but also of
7 course would have a variety of impacts on the
8 nature of the plant's discharge.

9 Third, and then I'll stop, both the
10 Region and CLF, as shown in their comments,
11 have been very interested in having the
12 cooling water intake structure located not at
13 the plant's current intake, which is on this
14 canal just off the Charles River, but rather
15 out at the head of the canal in the Charles
16 River itself.

17 Were there structures of the sort
18 that they are considering out there, that
19 would have major impacts on the water out in
20 the river. Entrainable and impingeable
21 organisms that might be excluded by such a
22 device would be excluded straight into the

1 location of the plants outfall, in other
2 words, right into the hottest part of the
3 river.

4 All of those considerations as they
5 arise under the 316(b) set of issues are
6 directly going to implicate all of the 316(a)
7 issues in terms of everything that the
8 permits require out in the river in terms of
9 all the buoys, and there is the issue around
10 whether or not there will be a diffuser. It
11 all gets thrown together.

12 JUDGE REICH: Okay.

13 MR. CHILD: We are quite confident
14 that we will be commenting into the Region's
15 proposed permit on the 316(b) issues with
16 quite a bit of information as to how it
17 affects the 316(a) issue.

18 Thank you.

19 JUDGE REICH: Okay. I have heard
20 as a minimum the Region to be open to
21 considering the interrelationships as the
22 proceeding evolves.

1 MR. FEIN: Yes, Your Honor. It is
2 quite conceivable that there could be a few
3 provisions that would be indirectly affected.
4 If I may briefly respond to what was just
5 said, I would just note that the September 19
6 meeting, there is nothing about it that is in
7 the record before the Board.

8 JUDGE REICH: No, I understand
9 that. I take that as nothing more -- as
10 further illustration because there were
11 illustrations in what was filed with the
12 Board that there are interrelationships and
13 potential interrelationships. Don't take it
14 as anything broader than that.

15 MR. FEIN: And so Mirant stated at
16 the meeting, the EPA did not make any
17 statements agreeing to any of those
18 statement.

19 JUDGE REICH: Right.

20 MR. FEIN: I would just add that
21 many of the issues that Mr. Child has raised,
22 with respect to the interrelationships, are

1 things that are best decided by the Region in
2 the first instance. As Your Honor alluded
3 to, to resolve the question of what and how
4 much is interrelated now would require
5 delving fairly deeply into the merits before
6 the Region has even had a chance to come up
7 with the draft permit modification let alone
8 to deal with respect to the non-316(b)
9 provisions.

10 JUDGE REICH: Okay. I understand.

11 Yes, sir?

12 MR. SHELLEY: Your Honor, could I
13 just add one final comment, briefly, and that
14 is from our perspective and I think it is
15 certainly shared by EPA, that time is of the
16 essence here.

17 This plant has repowered recently,
18 operating under a 1988 permit that was issued
19 in a whole different operating regime
20 facility. There are environmental problems
21 in the river that we believe this plant is
22 associated with.

1 The interests of EPA and CLF and
2 CRWA, in terms of moving to a new
3 appropriately restricted permit, are quite
4 different practically. We would urge the
5 Environmental Appeals Board to work with
6 those thermal portions and the legal standard
7 that has to be applied narrow enough that it
8 could be resolved fairly quickly.

9 JUDGE REICH: Okay. Thank you. I
10 think I have probably heard enough to kind of
11 understand where the parties are coming from
12 and therefore I -- let me just check with Mr.
13 Brown, whether you have anything to add?

14 MR. BROWN: Thank you, Your Honor.
15 I think the parties have covered it well.

16 JUDGE REICH: Okay. Thank you. In
17 that case, I am going to adjourn the status
18 conference. Again, I thank counsel for their
19 participation, and even more so for the
20 quality of the filings before the Board. I
21 think they were quite good, quite clear, and
22 quite helpful in understanding where we stand

1 on this matter.

2 Thank you.

3 (Whereupon, at 11:15 a.m., the

4 HEARING was adjourned.)

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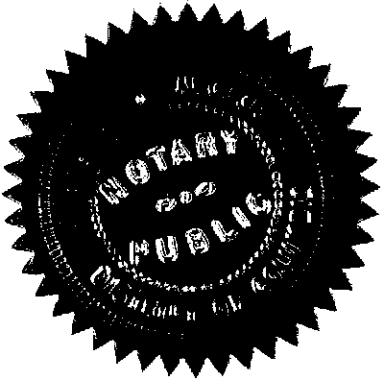
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I, OVEDA V. HANCOCK, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me via stenography, and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by and of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.



Oveda V. Hancock
OVEDA V. HANCOCK
Notary Public in and for the
District of Columbia

My Commission Expires:
June 29, 2009